

**OPINION
46-298**

April 10, 1946 (OPINION)

VETERANS

RE: Preference for Employment

This office is in receipt of your letter of April 8 and contents of same have been noted.

You state that you were elected president of the board of city commissioners at the last city election of Bismarck, and that you will take office shortly. In that connection you desire an opinion from this office with reference to the provisions of chapter 238 of the Session Laws of 1945, the same being the Veterans Preference Act.

The question you present is whether under the provisions of said chapter 238 the commission has any discretion in the matter of appointment of city attorney.

Section 1 of said chapter 238 reads as follows:

In each public department and upon all public works of the State of North Dakota and of the counties, cities or villages therein, honorable discharged members of the Armed Forces who have defended this nation in time of war, or their widows, or their wives when the veteran is wholly incapacitated by reason of disabilities not resulting from his own vicious habits, shall be preferred for appointment, and age, loss of limb or other physical impairment which does not in fact incapacitate the persons from performing the duties of the positions sought, shall not disqualify them, if they possess the requisite qualifications and business capacity to discharge the duties of the positions involved. Provided further, that to be eligible under the provisions of this Act the person applying shall be a citizen of the United States and shall have been a resident of the State of North Dakota at the time of his or her induction or enlistment in the armed forces and where a county, city or village appointment is involved the applicant shall have been a resident of such political subdivision for at least six months immediately preceding the appointment sought."

Under the language of said statute, particularly the following, "if they possess the requisite qualifications and business capacity to discharge the duties of the positions involved," the commission is vested with discretion in determining upon the general qualifications and business capacity of the person to be appointed as city attorney.

In determining the qualifications of an applicant, the commission may consider not only his technical qualifications but also experience that in its judgment is necessary in the proper discharge of the duties of the position involved. The commission may consider pending problems as well as important problems which may arise in the future, and the successful solution of which depends upon the general ability

and experience of the person who is to be appointed as city attorney. The city attorney is the legal advisor of the city commission in all official business pertaining to city government.

'Discretion' may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others." Phinney v. Montgomery, 257 N.W. 208. (Iowa)

'Discretion' is defined, when applied to public functionaries, to be a power or right, conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred." State v. Tindell, (Kan.), 210 P. 619.

It may generally be said that where a public officer or public body is vested with discretion, the same may not be overturned upon review unless it clearly appears that there has been an unwarranted abuse of such discretion.

It is the opinion of this office, therefore, that under the provisions of chapter 238 of the Session Laws of 1945, the city commission in considering applicants for the position of city attorney may take into consideration not only the technical qualifications of the applicants but all other matters such as experience and business capacity which in the judgment of the commission are necessary to a proper discharge of the duties of the position involved.

NELS G. JOHNSON

Attorney General